

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

11 D. HAYGOOD,) Case No. 08cv0374-JAH (BLM)
12 Petitioner,)
13 v.) **REPORT AND RECOMMENDATION FOR**
14 JAMES WALKER, Warden,) **ORDER DENYING PETITIONER'S**
15 Respondent.) **MOTION TO STAY PROCEEDINGS**
16 _____) [Doc. No. 13]
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This Report and Recommendation is submitted to United States District Judge John A. Houston pursuant to 28 U.S.C. § 636(b) and Local Civil Rules 72.1(d) and HC.2 of the United States District Court for the Southern District of California. Currently before the Court is a motion to stay federal proceedings while Petitioner Darrow Haygood, a state prisoner proceeding *pro se* and *in forma pauperis*, exhausts Claims 1, 2 and 6 of his First Amended Petition for Writ of Habeas Corpus ("FAP") in the California Supreme Court. Doc. No. 13 ("Mot. to Stay"). For the reasons discussed below, the Court recommends that Petitioner's request for a stay be **DENIED**.

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FACTUAL AND PROCEDURAL BACKGROUND

2 On April 1, 2008, Petitioner filed the FAP currently before
3 the Court, which alleges the following grounds for relief:
4 (1) ineffective assistance of trial counsel for failing to object to
5 the admissibility of a recorded interview, (2) ineffective
6 assistance of trial counsel for failing to pursue an investigation
7 into whether Petitioner had been Mirandized, (3) a due process
8 violation based on insufficient evidence supporting the gang
9 enhancement, (4) a due process violation for failure to bifurcate
10 the gang enhancement charge, (5) a due process violation for
11 admission of opinion testimony, and (6) insufficient evidence as to
12 the robbery conviction relating to Paul Savage. Doc. No. 4. In its
13 April 10, 2008 Notice Regarding Possible Dismissal of Petition for
14 Failure to Exhaust State Court Remedies ("Options Order"), this
15 Court notified Petitioner that he had failed to allege exhaustion as
16 to Claims 1, 2, 4 and 6 of the FAP. Doc. No. 7. In the same order,
17 this Court informed Petitioner of four options he might elect to
18 pursue in order to cure his failure to satisfy the exhaustion
19 requirement. Id. Petitioner was directed to elect one of the
20 options and file the appropriate briefing on or before May 13, 2008.
21 Id. The Court warned Petitioner that failure to respond to the
22 Court's Options Order would result in this Court recommending to the
23 District Judge that the Petition be dismissed without prejudice.
24 Id. at 4.

25 Petitioner did not respond in any manner to the Options Order
26 so this Court recommended that the FAP be dismissed. Doc. No. 8.
27 The Court afforded Petitioner an opportunity to file objections to
28 the Report and Recommendation and Petitioner did so on June 26,

1 2008. Doc. No. 11. After considering this Court's recommendation
 2 and Petitioner's objections, the District Judge found that Claims 1,
 3 2 and 6 remained unexhausted and again outlined for Petitioner that
 4 he had the option of dismissing the case while he returned to state
 5 court to exhaust these claims, formally abandoning the unexhausted
 6 claims, or filing a motion to stay federal proceedings while he
 7 returned to state court to exhaust Claims 1, 2 and 6. Doc. No. 12.

8 On November 3, 2008, Petitioner chose the third option and
 9 filed the motion to stay presently before the Court. Doc. No. 13.
 10 Respondent opposed the motion on December 3, 2008 [Doc. No. 15] and
 11 Petitioner filed a reply on December 22, 2008 [Doc. No. 18].

12 **DISCUSSION**

13 **A. Legal Standard**

14 A federal court may not consider a petition for habeas corpus
 15 unless the petitioner first has presented his claims to the state
 16 courts, thereby "exhausting" them. 28 U.S.C. § 2254(b)(1)(A); Rose
 17 v. Lundy, 455 U.S. 509, 522 (1982). The exhaustion requirement is
 18 founded on federal-state comity, as only when the state court has
 19 been presented with the claim may it "pass on and correct alleged
 20 violations of its prisoners' federal rights." Duncan v. Henry, 513
 21 U.S. 364, 365 (1995) (*per curiam*) (internal quotes and citations
 22 omitted).

23 Pursuant to the Anti-Terrorism and Effective Death Penalty
 24 Act ("AEDPA"), all federal habeas petitions are subject to a one-
 25 year statute of limitations, and claims not exhausted and presented
 26 to the federal court within the one-year period are forfeited. 28
 27 U.S.C. § 2244(d). When a petition for habeas corpus contains both
 28 exhausted and unexhausted claims, the petitioner may return to state

1 court to exhaust the remaining claims. See Rhines v. Weber, 544
 2 U.S. 269, 274-75 (2005). However, the AEDPA statute is not tolled
 3 by the filing of a federal habeas petition, so a federal petitioner
 4 seeking to return to state court to exhaust claims must do so and
 5 subsequently re-present the newly-exhausted claims within the one-
 6 year period. See id. This is not always possible, and in such
 7 situations petitioners "run the risk of forever losing their
 8 opportunity for any federal review of their unexhausted claims."
 9 Id. at 275.

10 To permit petitioners to exhaust their claims without running
 11 afoul of the statute of limitations, the Supreme Court determined
 12 that petitioners may request a stay of their petition pending
 13 resolution of the unexhausted claims in state court. Id. at 276-
 14 278. However, "a stay-and-abeyance should be available only in
 15 limited circumstances, and is appropriate only when the district
 16 court determines that there was good cause for the failure to
 17 exhaust." Jackson v. Roe, 425 F.3d 654, 661 (9th Cir. 2005)
 18 (applying Rhines standard) (internal quotes and citations omitted).
 19 In addition to "good cause," a petitioner must show that his
 20 unexhausted claims are "potentially meritorious," and that there is
 21 "no indication that the petitioner engaged in intentionally dilatory
 22 litigation tactics." Rhines, 544 U.S. at 278; Jackson, 425 F.3d at
 23 661. These safeguards are necessary to ensure that the stay and
 24 abeyance procedure does not frustrate AEDPA's twin purposes of
 25 reducing delays in the execution of state and federal criminal
 26 sentences and of encouraging petitioners to fully exhaust their
 27 claims before filing in federal court. Jackson, 425 F.3d at 660.
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1 While the Supreme Court has not defined what constitutes
 2 "good cause" for failure to exhaust a claim, the Ninth Circuit has
 3 opined that good cause requires something less than a showing of
 4 "extraordinary circumstances." Jackson, 425 F.3d at 662. More
 5 recently, the Ninth Circuit provided further guidance in Wooten v.
 6 Kirkland, 540 F.3d 1019 (9th Cir. 2008). In Wooten, the
 7 petitioner's attorney filed direct appeals in the state court of
 8 appeal and the California Supreme Court. Id. at 1022. Both appeals
 9 were denied. Id. Although petitioner was "under the impression"
 10 that his counsel presented all claims at both levels of appeal, one
 11 claim was, in fact, omitted from the state supreme court petition.
 12 Id.

13 On federal habeas review¹, the district court held that the
 14 omitted claim was not exhausted and the petition was, therefore,
 15 mixed. Id. at 1023. The court denied petitioner's motion to stay
 16 and abey the case while he returned to state court, holding that
 17 petitioner's failure to realize he had an unexhausted claim did not
 18 constitute good cause. Id. at 1022-23. The Ninth Circuit upheld
 19 the district court's decision, stating that:

20 To accept that a petitioner's "impression" that a claim
 21 had been included in an appellate brief constitutes
 22 "good cause" would render stay-and-abeyance orders
 23 routine.

24 ... Additionally, were we to endorse such a broad
 25 interpretation of "good cause" that allowed for routine
 26 stays of mixed petitions, we would also be undermining
 27 the goals of AEDPA. In authorizing stays of habeas
 28 petitions only in "limited circumstances," Rhines
 29 explicitly acknowledges AEDPA's dual purposes: to reduce
 30 delays in executing state and federal criminal sentences
 31 and to streamline federal habeas proceedings by

¹ The petitioner was not represented by counsel during federal habeas proceedings.

1 increasing a petitioner's incentive to exhaust all
 2 claims in state court. Stays, however, delay the
 3 execution of sentences and reduce a petitioner's
 4 incentive to exhaust all claims in state court. See
 [Rhines] at 277 ("Stay and abeyance, if employed too
 frequently, has the potential to undermine [AEDPA's]
 twin purposes.")

5 Id. at 1024.

6 In declining to adopt a "broad interpretation" (id.) of good
 7 cause, the court moved away from the more liberal standards
 8 previously enunciated by some district courts, and re-emphasized
 9 that motions to stay only would be granted in "limited
 10 circumstances." Compare id. (good cause not found when petitioner
 11 mistakenly believed that his attorney exhausted all claims), and
 12 Riner v. Crawford, 415 F. Supp. 2d 1207, 1211 (D. Nev. 2006) (good
 13 cause may be found when a petitioner shows "he was prevented from
 14 raising the claim, either by his own ignorance or confusion about
 15 the law or the status of his case").

16 When a petitioner shows good cause for his failure to
 17 exhaust, presents potentially meritorious claims, and demonstrates
 18 that he has not engaged in dilatory litigation tactics, "it likely
 19 would be an abuse of discretion for a district court to deny a
 20 stay." Rhines, 544 U.S. at 278. "In such a case, the petitioner's
 21 interest in obtaining federal review of his claims outweighs the
 22 competing interests in finality and speedy resolution of federal
 23 petitions." Id.

24 **B. Good Cause**

25 Petitioner's motion to stay is very brief and does not set
 26 forth any explanation of why he believes he had good cause for his
 27 failure to exhaust. See Mot. to Stay. Petitioner's subsequent
 28 filing, which the Court construes to be a reply brief, also does not

1 make a good cause argument. Doc. No. 18 (hereinafter "Pet'r
2 Reply"). Instead, Petitioner argues that he did exhaust Claims 1,
3 2 and 6. Id. at 2. Petitioner attaches a portion of what he
4 asserts is the petition for review his attorney filed in the
5 California Supreme Court as evidence of this contention. Id.

6 As the District Judge explained in his October 15, 2008 Order
7 Adopting in Part the Magistrate Judge's Report and Recommendation,
8 Petitioner only presented Claims 1 and 2 to the California Court of
9 Appeal, not the California Supreme Court. See Doc. No. 12. Nothing
10 in the record before this Court or Petitioner's reply suggests
11 otherwise and these claims, therefore, remain unexhausted.

12 In regard to Claim 6, Petitioner provided this Court with
13 pages he claims are part of his petition for review by the
14 California Supreme Court – a brief that had not previously been
15 presented in these federal proceedings. Pet'r Reply, Ex. A at 10-11
16 (referring to page numbers listed at the bottom of the exhibit
17 pages). These pages appear to contain the legal argument section of
18 Petitioner's fifth claim before that court, which largely mirrors
19 Claim 6 of Petitioner's FAP (Petitioner's claim of insufficiency of
20 the evidence of the robbery conviction relating to Paul Savage).
21 However, upon closer examination, the Court notes that the brief is
22 dated March 16, 2005 (see id., Ex. A at 11), which is three months
23 before the very same brief states that the Court of Appeal issued an
24 order affirming Petitioner's conviction (see id., Ex. A at 1-2). A
25 review of the docket for each of Petitioner's state court actions
26 reveals that Petitioner filed his reply brief before the Court of
27 Appeal on March 16, 2005, and that Petitioner's petition for review
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1 by the California Supreme Court was not filed until July 29, 2005.²
 2 In view of these dates, it is likely that the first few pages of the
 3 briefing Petitioner presented to this Court came from his petition
 4 for review by the California Supreme Court, while the latter pages
 5 were part of his reply brief to the California Court of Appeal.³ As
 6 such, this Court does not have evidence before it conclusively
 7 demonstrating that Petitioner exhausted Claim 6 in the California
 8 Supreme Court.

9 Regardless, even presuming Petitioner presented the
 10 California Supreme Court with the same argument set forth in his
 11 March 16, 2005 reply brief, Petitioner still fails to satisfy the
 12 exhaustion requirement. The claim presented to the state court
 13 regarding insufficiency of the evidence of the robbery conviction
 14 relating to Paul Savage does not allege any Constitutional grounds
 15 for relief, nor does it cite to any federal law. See Pet'r Reply,
 16 Ex. A at 10-11. Exhaustion of a habeas petitioner's federal claims
 17 requires that they have been "fairly presented" in each appropriate
 18 state court, including a state supreme court with powers of
 19 discretionary review, and that the petitioner "alert[] [the state]
 20 court to the federal nature of the claim." Baldwin v. Reese, 541
 21 U.S. 27, 29 (2004). Because Petitioner failed to alert the
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24 ² The dockets of Petitioner's state cases (Case Numbers D043134 and
 25 S136036) may be found on the California Appellate Courts State Information
 26 Website, located at <http://appellatecases.courtinfo.ca.gov> (last visited January
 20, 2009).

27 ³ The fact that the latter pages use the phrase "[a]s noted in the
 28 opening brief, this Court previously held in the appeal of co-defendant
 George..." supports the conclusion that these pages were taken from Petitioner's
 reply brief before the California Court of Appeal. See Pet'r Reply, Ex. A at 10.

1 California Supreme Court to the federal nature of his claim⁴, this
 2 Court finds that Claim 6 also remains unexhausted.

3 **C. Merit of Claims and Diligence**

4 In addition to failing to offer any good cause for his
 5 failure to exhaust Claims 1, 2 and 6, Petitioner presents no
 6 argument or evidence suggesting that these unexhausted claims are
 7 "potentially meritorious." Rhines, 544 U.S. at 278; Jackson, 425
 8 F.3d at 661. Further, there is some indication that Petitioner has
 9 been dilatory in pursuing exhaustion. Rhines dictates that before
 10 a stay may be granted, the petitioner must satisfy the good cause
 11 and merit elements and there must be "no indication that the
 12 petitioner engaged in intentionally dilatory litigation tactics."
 13 Rhines, 544 U.S. at 278. As Respondent highlights in this case,
 14 Petitioner has been aware of the factual basis underlying Claims 1
 15 and 2 for some time because he presented them to the California
 16 Court of Appeal in a petition for writ of habeas corpus. See Resp't
 17 Opp'n at 3; Doc. No. 11, Ex. A (Petitioner's objections to this
 18 Court's report and recommendation attaching the Court of Appeal's
 19 January 22, 2007 denial of his habeas petition). Petitioner offers
 20 no explanation for why he did not subsequently present these claims
 21 to the California Supreme Court in order to exhaust them. Likewise,
 22 evidence relating to Claim 6 was available in the appellate record
 23 yet, as discussed above, Petitioner did not present a federal basis
 24 for this claim to the California Supreme Court. As such, the Court
 25 finds that Petitioner's failure to pursue exhaustion of federal
 26 claims premised on these arguments in the California Supreme Court

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 28 ⁴ Notably, it appears Petitioner also failed to allege any federal basis for habeas relief in Claim 6 of his FAP.

1 demonstrates that Petitioner has been dilatory in pursuing his
2 rights.

3 **CONCLUSION**

4 In sum, this Court finds that Petitioner has not demonstrated
5 the requisite good cause to justify staying his FAC while he returns
6 to state court to exhaust Claims 1, 2 and 6, nor has he presented
7 any evidence suggesting that these claims are potentially
8 meritorious. For these reasons, **IT IS HEREBY RECOMMENDED** that the
9 District Court issue an Order: (1) approving and adopting this
10 Report and Recommendation, and (2) denying Petitioner's motion to
11 stay.

12 **IT IS HEREBY ORDERED** that any written objections to this
13 Report must be filed with the Court and served on all parties **no**
14 **later than February 17, 2009.** The document should be captioned
15 "Objections to Report and Recommendation."

16 **IT IS FURTHER ORDERED** that any reply to the objections shall
17 be filed with the Court and served on all parties **no later than**
18 **March 3, 2009.** The parties are advised that failure to file
19 objections within the specified time may waive the right to raise
20 those objections on appeal of the Court's order. See Turner v.
21 Duncan, 158 F.3d 449, 455 (9th Cir. 1998).

22 DATED: January 26, 2009

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24 BARBARA L. MAJOR
25 United States Magistrate Judge
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